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September 4, 2007

BY HAND DELIVERY AND ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

FILED/ACCEPTED
SEP - 4 2007
Federal Communications Commission
Office of the Secretary

Re: In the Matter of Petitions of the Verizon Telephone Companies for
Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York,
Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan
Statistical Areas, WC Docket No. 06-172
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Dear Ms. Dortch:

On behalf of Broadview Networks, Inc., Covad Communications Group, FDN Communications, NuVox Communications, XO Communications, LLC, Alpheus Communications, L.P., ATX Communications, Inc., Cavalier Telephone Corp., CloseCall America, Inc., DSLnet Communications, LLC, Eureka Telecom, Inc. d/b/a InfoHighway Communications, ITC^DeltaCom Communications, Inc., McLeodUSA Telecommunications Services, Inc., MegaPath, Inc., Mpower Communications Corp., Norlight Telecommunications, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., RNK Inc., segTEL, Inc., Talk America Holdings, Inc., TDS Metrocom, LLC, U.S. Telepacific Corp. d/b/a Telepacific Communications, and COMPTel (collectively "Joint Signatories") enclosed for filing in the above-referenced proceeding are two copies of the redacted version of the Joint Signatories' ex parte letter. A copy of this redacted ex parte letter is also being submitted via the Federal Communications Commission's Electronic Comment Filing System.

In accordance with paragraph 15 of the *Second Protective Order*, dated January 25, 2007 (DA 07-208), one copy of the letter which contains Highly Confidential information is being submitted to your attention under separate cover letter. Two copies of the Highly

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Confidential Filing are also being submitted, by hand delivery, to Mr. Gary Remondino of the Wireline Competition Bureau.

Kindly date stamp the duplicate of this letter and return it to the courier.

Please contact the undersigned at (202) 342-8531, if you have any questions about this letter.

Respectfully submitted,

A handwritten signature in cursive script, reading "Genevieve Morelli". The signature is written in dark ink and is positioned above the printed name.

Genevieve Morelli

Enclosures

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September 4, 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172*

Dear Ms. Dortch:

The undersigned companies submit this letter to supplement the already overwhelming record against granting Verizon forbearance from Section 251(c)(3) unbundling obligations in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas “(MSAs)”.¹ The letter (1) discusses the Commission’s Section 251(c)(3) forbearance framework and addresses how it applies to the six MSAs for which Verizon is seeking regulatory relief, particularly given the significant differences in scale and scope between the MSAs at issue here and the Section 251(c)(3) forbearance petitions granted previously; and (2) provides the results of detailed empirical analyses strongly repudiating the “too little too late” evidence of competition submitted by Verizon. Specifically, this letter will show that:

- * Verizon has not shown that it has satisfied the framework established by the Commission to guide its Section 251(c)(3) forbearance analysis and, in any case, cannot show that there is sufficient facilities-based competition in any product or geographic market to ensure sustainable competition if forbearance were granted;

¹ The signatories to this letter note that interested parties have provided the Commission with additional reasons for it to deny the Section 251(c)(3) forbearance Verizon requests, particularly because a grant of forbearance would harm consumers and competition for lower-speed and higher-speed fixed broadband services. *See, e.g.,* Comments of Earthlink, Inc. and New Edge Network, Inc., WC Docket No. 06-172 (filed Mar. 5, 2007). Also, the discussion in this letter of the analytical framework employed by the Commission in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* is not intended as an endorsement of that framework, which the signatories believe does not produce a meaningful competitive analysis.

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- * Verizon's wire center-specific E911 data is inherently inaccurate and cannot be relied upon to support its claim that competition is sufficiently robust to justify Section 251(c)(3) forbearance;
- * Verizon's special access data does not support forbearance from Section 251(c)(3) loop and transport unbundling obligations; and
- * The Commission, in conducting its forbearance analysis, must consider the extraordinary scale and scope of Verizon's requests, and the aggregate impact forbearance would have on consumers.

Verizon's forbearance requests are truly extraordinary and should be treated accordingly. The scale of Verizon's petitions is unprecedented. Verizon seeks Section 251(c)(3) loop and transport unbundling forbearance (as well as forbearance from numerous dominant carrier obligations, price cap, and *Computer Inquiry* rules) in nearly 800 wire centers throughout six MSAs containing some of the largest population centers in the country. In all, over 34 million individuals across 10 states could be affected if the regulatory relief sought by Verizon were granted. The public interest stakes are very high, with tens of millions of residential and business consumers depending on the Commission to protect their interests. Because the implications of Verizon's requests are so dramatic, the predictive judgment employed by the Commission as a basis for forbearance in the *Omaha Forbearance Order*² has no place in the instant analysis. The Commission must demand solid evidence that a sufficient, sustainable level of facilities-based competition exists today in each product and geographic market before concluding that any forbearance is warranted.

Notwithstanding the overwhelming record evidence against granting Verizon's petitions and the fact that Verizon's "late-filed" empirical data should be ignored by the Commission,³ various carriers have undertaken a comprehensive review of the accuracy of

² *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007) ("*Qwest Omaha*").

³ On the final day of the formal pleading cycle in the above-captioned proceeding, Verizon for the first time submitted empirical data in support of its request for forbearance from Section 251(c)(3) loop and transport unbundling obligations. Soon thereafter, numerous carriers filed a motion to dismiss or, in the alternative, deny the Verizon petitions on the ground that it would be patently unfair and contrary to the integrity of the forbearance process for the Commission to take Verizon's late-filed data into account in making its forbearance determinations. *Motion to Dismiss or, In the Alternative, to Deny Petitions for Forbearance on the Basis of Late-Filed Data*, WC Docket No. 06-172 (filed May 22,

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Verizon's late-filed data. The results, discussed below, unequivocally show that Verizon's data does not support its claims that facilities-based mass market or enterprise market competition in any wire center within any of the six MSAs at issue is robust enough to warrant Section 251(c)(3) loop and transport forbearance. Nor, as a threshold matter, is Verizon's data responsive to the framework used by the Commission to guide its forbearance analysis or to the statutory forbearance standard. Because of the extensive infirmities with Verizon's data, each of the Verizon petitions should be denied in its entirety.

I. VERIZON HAS NOT SATISFIED THE TEST ESTABLISHED BY THE COMMISSION TO GUIDE ITS SECTION 251(c)(3) FORBEARANCE ANALYSIS

Because it cannot satisfy the framework used in the *Omaha Forbearance Order* for measuring whether forbearance from Section 251(c)(3) unbundling obligations is appropriate, Verizon tries to short-circuit the required analysis by redefining portions of that framework and offering watered-down "proof." Specifically, instead of showing that facilities-based carriers are competing effectively in each wire center, Verizon presents line count information purporting to show that *some type* of competitive carrier is providing *some type* of competitive service in each wire center within the six MSAs at issue. Taken at face value (which it should not be), Verizon's exhibits might show that individual competitive carriers have begun to offer some level of competitive service in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs.⁴ Verizon's "proof," however, begins and ends there. Verizon fails to provide any evidence that the carriers to which it points are facilities-based or are successfully offering substitutable services in a manner that comports with the Section 251(c)(3) forbearance analysis required by Section 10 of the Act, as first applied in the *Omaha Forbearance Order*.

A. Verizon Has Failed to Demonstrate Competitive Facilities Coverage

The starting point for the Commission's forbearance analysis under the *Omaha Forbearance Order* framework requires the party petitioning for forbearance from Section 251(c)(3) unbundling obligations to show for each product market that competitive carriers have constructed competing last-mile facilities in a wire center and that each of those competitive carriers is willing and able to use its facilities, including its own loop facilities, within a commercially reasonable period of time to provide a full range of services that are substitutes for the incumbent local exchange carrier's ("ILEC's") local service offerings to 75% of the end user

2007) ("Motion to Dismiss – Late-Filed Data"). The motion remains pending at the Commission.

⁴ As shown in Section II, *infra*, Verizon's market penetration data does not provide an accurate assessment of the status of facilities-based competition in any wire center in any MSA.

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locations accessible from a wire center.⁵ The Commission determined that such coverage is the minimum needed to ensure that “significant competition from competitors that do not rely heavily on [the ILEC’s] wholesale services” is present in a wire center before forbearance is granted.⁶ As stated by the Commission in the *Omaha Forbearance Order*:

We find that forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing “last-mile” facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Omaha MSA.⁷

The requirement was also applied in the *Anchorage Forbearance Order*, where the Commission “tailor[ed] ACS’s relief to those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a).” More specifically, ACS was granted forbearance in “the only wire center service areas where GCI’s voice-enabled cable plant covers at least 75% of the end user locations that are accessible from that wire center.”⁸

Despite the clear requirement that a petitioner demonstrate that the competitive entry upon which it relies is truly “facilities based,” Verizon makes absolutely no attempt to provide such a showing. Nowhere in its submissions does Verizon even attempt to establish that the competitive carriers which it alleges compete against it connect with end users in each

⁵ See *Omaha Forbearance Order*, at n. 156, ¶ 69.

⁶ *Id.*, at ¶ 60. This showing of competitive facilities coverage is a necessary, but not a sufficient, precondition for granting Section 251(c)(3) forbearance. As discussed below, in both the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*, the Commission relied on considerable additional evidence of actual competition in reaching its forbearance determinations.

⁷ *Id.*

⁸ See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, at ¶ 21 (2007) (“*Anchorage Forbearance Order*”).

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geographic and product market over their own last-mile loop facilities or that they are present throughout each wire center in the geographic markets for which relief is sought.⁹

Verizon's refusal to address competitive carriers' facilities coverage is surprising in light of its repeated citations to the *Omaha Forbearance Order* in its petitions¹⁰ and its recent advocacy that the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* are relevant and may be relied upon by parties in support of their forbearance requests. In its response to the motion to vacate the *Anchorage Forbearance Order* filed by Covad Communications Group, NuVox Communications, and XO Communications, LLC,¹¹ Verizon opined that "there can be no possible bar on Verizon citing either the *Qwest Omaha Order* or

⁹ Where CLECs have deployed facilities and whether they connect to buildings over their own facilities is information readily available from sources such as GeoResults (for the enterprise market), yet Verizon elects not to supply it. Verizon's recent comments in the *Special Access Reform* proceeding in fact rely in part on GeoResults data to support the contention that there are sufficient facilities-based competitive alternatives (of sufficient scale and scope) to discipline Verizon's behavior with respect to its special access offerings. See Comments of Verizon, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593 (filed Aug. 8, 2007) ("*Special Access Reform*"), at 16-17. Given that the information is available to Verizon and yet not used, the valid presumption is that it would not support the contention that the carriers are truly end-to-end "facilities based" competitors, as required by the *Omaha* analytical framework.

¹⁰ Verizon cites to the *Omaha Forbearance Order* over three dozen times in each of its six forbearance petitions. See *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area*; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area*; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area*; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area*; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area*; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006) (consolidated).

¹¹ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Motion to Vacate, WC Docket No. 05-281 (filed Jul. 5, 2007).

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[the *Anchorage Forbearance*] Order in support of its own forbearance petitions.”¹² Verizon cannot have it both ways. It should not be permitted to invoke the *Omaha Forbearance Order* as precedent when doing so is consistent with the Verizon advocacy position and ignore that precedent when it is convenient to Verizon’s position.

It is understandable why Verizon has chosen to disregard competitive facilities coverage in making its case for Section 251(c)(3) forbearance. The Commission has defined a facilities-based competitor for purposes of its Section 251(c)(3) forbearance analysis as a carrier that can successfully provide local exchange and exchange access services without relying on the ILEC’s loops or transport.¹³ In the *Omaha Forbearance Order*, the Commission specified that Section 251(c)(3) forbearance is warranted “only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a).”¹⁴ And in the *Anchorage Forbearance Order*, the Commission limited the grant to ACS of relief from Section 251(c)(3) unbundling obligations to those “portions of its service territory . . . where a facilities-based competitor has substantially built out its network.”¹⁵ The competitive inroads Verizon would have the Commission focus on (to the extent they actually exist) are largely the result of continued use of Verizon facilities (*i.e.*, special access and unbundled network elements (“UNEs”)).¹⁶ Verizon’s failure to address the facilities coverage requirement and its focus on the purported level of competition generally is a

¹² *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Opposition of Verizon to Motion to Vacate, WC Docket No. 05-281 (filed Jul. 16, 2007), at 4.

¹³ See, e.g., *Omaha Forbearance Order*, at ¶ 64.

¹⁴ *Omaha Forbearance Order*, at ¶ 61 (emphasis supplied).

¹⁵ *Anchorage Forbearance Order*, at ¶ 1.

¹⁶ Verizon’s evidence consists in significant part of data purporting to show wire center specific market penetration by carriers that rely on Verizon loop and/or transport UNEs and/or Verizon special access. These carriers include Broadview Networks, Cavalier, Global Crossing, InfoHighway Communications, One Communications, PAETEC, Time Warner Telecom, and XO Communications. See *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Reply Comments of Verizon, WC Docket No. 06-172 (filed Apr. 18, 2007) (“*Verizon Reply Comments*”), at Exhibit 3. In addition, Verizon admits that it is “one of the largest wholesale suppliers . . . in the enterprise market” and that “it provides the vast majority of wholesale inputs . . . as special access, not as unbundled network elements.” See, e.g., *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 23.

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meager attempt to end-run the Commission's forbearance requirements that should not be countenanced by the Commission.

The only data presented by Verizon as evidence of competitive facilities deployment in the enterprise market in the six MSAs at issue consists of figures purporting to represent the number of competitive fiber routes in each MSA. According to Verizon, between two and 24 competitors operate fiber networks within the MSAs that are the subject of Verizon's petitions.¹⁷ Verizon offers maps claiming to show these fiber routes are within each of these MSAs,¹⁸ and represents that "these fiber routes reach virtually all areas of the . . . MSA where enterprise customers are concentrated."¹⁹ There are fundamental problems with Verizon's data, however, rendering it of little to no probative value. Specifically:

- * Verizon does not present the data on a wire center level, consistent with the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*.
- * Verizon fails to indicate how many competing fiber providers operate in each wire center, and it does not identify the fiber providers it claims are operating each route.
- * Verizon fails to identify which (if any) of these fiber networks in each wire center reach, and can support the offering of a full range of services within a commercially reasonable period of time to, individual customer locations.²⁰

¹⁷ Verizon Petition – Boston, at 20 (12 competitive fiber networks); Verizon Petition – New York, at 24 (24 competitive fiber networks); Verizon Petition – Philadelphia, at 24 (12 competitive fiber networks); Verizon Petition – Pittsburgh, at 21 (four competitive fiber networks); Verizon Petition – Providence, at 21 (three competitive fiber networks); and Verizon Petition – Virginia Beach, at 20 (two competitive fiber networks).

¹⁸ See, e.g., *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area*, WC Docket No. 06-172, Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Boston Metropolitan Statistical Area, (filed Sept. 6, 2007) ("*Lew/Verses/Garzillo Decl. – Boston*"), Exhibits 5, 6.

¹⁹ Verizon Petition – Boston, at 21. See also Verizon Petition – New York, at 23; Verizon Petition – Philadelphia, at 23; Verizon Petition – Pittsburgh, at 21; Verizon Petition – Providence, at 20; Verizon Petition – Virginia Beach, at 20.

²⁰ See, e.g., *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Comments of Broadview Networks, Inc., Covad Communications Group, NuVox Communications, and XO Communications, LLC, WC Docket No. 06-172 (filed Mar. 5, 2007), at 45-46.

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- * Verizon fails to identify whether (and to what extent) the competitive fiber on its route maps is being used to provide competitively-available telecommunications services (versus fiber being put to private use) and Verizon fails to differentiate between fiber transport and fiber being used to provide local exchange access.
- * Verizon does not identify which (if any) competitive fiber is being offered to carrier customers on a wholesale basis.
- * Verizon fails to acknowledge that merely passing a customer location does not necessarily enable the owner of competitive fiber to provide service at that customer location.²¹

Thus, while the data supplied by Verizon may not be entirely irrelevant, it certainly is inadequate. Under the *Omaha* framework, petitioners cannot win forbearance by showing that competitors have put their toes in the water. Rather, they must demonstrate conclusively that competitors are swimming in the pool. Verizon simply has not done that.

B. Verizon Has Not Shown That At Least Two Facilities-Based Competitors Have Sufficient Competitive Presence In Each Wire Center

The Section 251(c)(3) forbearance framework applied in the Omaha and Anchorage forbearance proceedings does not begin and end with a showing that the threshold percentage of “coverage” by competitive facilities in a wire center has been reached. To ensure that the significant anti-competitive effects of a duopoly market do not occur, it is critical that at least two facilities-based competitors offering substitutable services meet the coverage threshold in a particular wire center. As discussed below, it is a misreading of the *Omaha Forbearance Order* to conclude that the Commission has found that a duopoly is sufficient to meet the requirements of Section 10. If Verizon faces a single facilities-based competitor in a particular wire center, the wire center is not sufficiently competitive to protect against the risks of tacit collusion between Verizon and the competitor that would necessarily lead to restricted service choices and higher prices for consumers.

²¹ While some competitive carriers have constructed fiber rings in geographic areas where they offer local exchange services, the vast majority of commercial buildings are not located on those fiber rings and the carriers must construct building “laterals” to serve customers located in those commercial buildings. The construction of laterals is extremely difficult, time consuming, and costly. According to XO Communications, LLC (“XO”), the extraordinary costs of constructing laterals results in XO not being able, realistically, to add a building to its network unless customer demand at that location exceeds three DS-3’s of capacity. See *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, *Declaration of Ajay Govil on Behalf of XO Communications, Inc.* (filed Aug. 8, 2007), at 10.

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The Commission has consistently endorsed the view – uniformly held by economists²² – that duopoly markets are insufficiently competitive to protect against anti-competitive conduct. In the *UNE Remand Order*, for example, the Commission concluded that an ILEC/cable duopoly does not constitute sufficient competition to realize the local market-opening goals of the 1996 Telecom Act. The Commission noted:

We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be “impaired” within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers.²³

The Commission went on to state that a standard that would be satisfied by the existence of a single competitor “would not create competition among multiple providers of local service that would drive down prices to competitive levels” and that “such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market.”²⁴ Similarly, in reviewing proposed mergers among competing satellite television providers, the Commission recognized that a merger resulting in duopoly “create[s] a strong presumption of significant anticompetitive effects.”²⁵

In the *Omaha Forbearance Order*, the Commission dismissed concerns that forbearing from application of unbundling requirements to Qwest would result in a cable/ILEC duopoly on the ground that “the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated

²² See, e.g., Arthur G. Fraas & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, The Journal of Industrial Economics, Vol. 26, No. 1, (Sept. 1977), at 21.

²³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3726 (1999) (“*UNE Remand Order*”).

²⁴ *Id.*

²⁵ *In the Matter of Application of EchoStar Communications Corporation*, Hearing Designation Order, 17 FCC Rcd 20559, 20605 (2002).

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behavior or other anticompetitive conduct” in the Omaha MSA.²⁶ The Commission predicted that in the absence of a Section 251(c)(3) unbundling obligation, Qwest would have the incentive to make attractive wholesale offerings available to competitors that do not have their own last-mile facilities, thereby avoiding the development of a Qwest/Cox duopoly.²⁷

Unfortunately, the Commission’s predictive judgment in the *Omaha Forbearance Order* turned out to be incorrect. McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”), a competitor in the Omaha MSA dependent on access to Qwest’s last-mile facilities, recently filed a Petition for Modification of the *Omaha Forbearance Order*, requesting that the Commission reinstate Qwest’s Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission’s “‘predictive judgment’ that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c) has proven incorrect.”²⁸ McLeodUSA detailed it has made repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest and that “Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers.”²⁹ McLeodUSA pointed out that Qwest’s refusal to negotiate wholesale rates following the *Omaha Forbearance Order* not only defies the Commission’s predictive judgment regarding Qwest’s behavior once Section 251(c)(3) forbearance was granted, but also violates Qwest’s obligation under Section 271(c)(2)(B) to provide unbundled access to local loops and transport at just and reasonable rates.³⁰

At the same time, Cox has not entered the wholesale market, offering a wholesale loop and/or transport product to McLeodUSA and other competitive carriers.³¹ In the face of the post-forbearance market behavior of these two facilities-based carriers – the only two carriers with last-mile facilities in the nine Omaha wire centers where Qwest was granted Section

²⁶ *Omaha Forbearance Order*, at ¶ 71.

²⁷ *Id.*, at ¶ 67.

²⁸ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) (“*McLeodUSA Petition*”), at 1.

²⁹ *Id.*, at 4.

³⁰ *Id.*, at 10.

³¹ Cox’s network is not capable of supplying copper loops to carriers seeking to derive broadband services over such facilities.

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251(c)(3) forbearance – McLeodUSA is planning its exit from the Omaha MSA.³² Here, if Verizon and a single competitor maintain the only last-mile facilities available to serve customers in a particular wire center within any of the six MSAs at issue, there is no evidence to support the prediction that, if Section 251(c)(3) forbearance is granted, a wholesale market will develop or that the retail market behavior of the two carriers will deviate at all from the behavior of Qwest and Cox in Omaha. Indeed, as detailed in Section III.B, *infra*, Verizon's recent pricing behavior in the special access market strongly suggests that it is unconstrained by competitive pressures.

Thus, an ILEC seeking forbearance must prove that at least two competitive carriers meet the facilities-based coverage requirement and that each of those competitors, using its own facilities (including its own loops), is providing a full range of services that are substitutes for Verizon's local service offerings in each product market in each wire center. Verizon, with the submission of several exhibits purporting to show competitive line counts in each MSA, focuses on only one element of the showing it is required to make. Its proof therefore is insufficient to meet the Section 10 test.

C. **Verizon Has Not Shown That Each Facilities-Based Competitor In A Wire Center Is Providing A Full Range Of Substitutable Services**

As noted above, as an ILEC seeking Section 251(c)(3) forbearance under the *Omaha Forbearance Order* framework, Verizon must prove that its facilities-based competitors are providing a "full range of services that are substitutes" for Verizon's local service offerings.³³ This requirement is critical to ensure that Verizon faces enough competition to guarantee that the interests of consumers and the goals of the Act are protected.³⁴ Substitutability cannot be known with certainty, and is best measured by the level of penetration the facilities-based competitive carriers have been able to achieve in a wire center, for if the competitors' local service offerings are true substitutes for Verizon's services, it can be expected that an appreciable percentage of users who previously obtained local service from Verizon will choose to purchase service from the competitors. Conversely, a purported facilities-based competitor

³² *Id.*, at 14. McLeodUSA is not the only competitor that has concluded the forbearance granted Qwest in the *Omaha Forbearance Order* forecloses it from competing in the Omaha MSA. Integra Telecom, Inc. recently explained that it has abandoned plans to enter the Omaha market as a result of the *Omaha Forbearance Order*. See *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Comments of Integra Telecom, Inc., WC Docket No. 06-172 (filed Mar. 5, 2007), at 4.

³³ See, e.g., *Omaha Forbearance Order*, at n. 156.

³⁴ *Id.*, at ¶ 61.

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that has not been successful in achieving a significant level of market penetration cannot be assumed to be offering the full range of services that are substitutes for Verizon's local service offerings.³⁵

The Commission has long recognized the importance of market share evidence in conducting its forbearance analyses. In its November 1999 order denying a US West petition seeking forbearance from dominant carrier regulation in the provision of certain special access and high capacity transport services in the Phoenix MSA, the Commission stated: "Although we have found that market share should not be the 'sole determining factor of whether a firm possesses market power,' such information certainly is significant to a determination of whether a carrier has market power."³⁶

Indeed, the Commission's decision to grant Qwest and ACS partial forbearance from Section 251(c)(3) loop and transport unbundling obligations in the Omaha and Anchorage markets, respectively, was grounded in part on the significant market share the major cable competitor in each market was able to achieve. In both MSAs, at the time forbearance was granted, the cable company and the ILEC held roughly equal market positions. Here, Verizon has produced no credible data showing the specific residential or enterprise market penetration achieved by individual competitive carriers using their own facilities.

In sum, Verizon has failed to demonstrate that each of the elements of *Omaha Forbearance Order* framework, as well as the other significant factors the Commission must take into account in reaching a forbearance determination (e.g., public interest considerations), has been met for any product or geographic market in any of the six MSAs for which it is

³⁵ Of course, market penetration for each facilities-based competitor must be measured on a product market-specific basis. Competitive inroads by a facilities-based competitor in one product market (e.g., mass market/retail market) proves nothing regarding the substitutability of the competitor's services in a different product market (e.g., enterprise market/wholesale market). For example, cable television plant using DOCSIS 2.0 technology is incapable of providing high-speed integrated voice and data services ubiquitously to business customers. As already evidenced in the record, because of bandwidth limitations, such technology is only capable of supporting highly sporadic offerings of such services. See, e.g., *Anchorage Forbearance Order*, at n. 137.

³⁶ *Petition of US West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Red 19947, 19962 (1999) (emphasis in original; footnote omitted). The D.C. Circuit endorsed the Commission's focus on market share as a *prima facie* showing of competition, but it nevertheless remanded the proceeding to the Commission on the ground that the Commission "failed to address the evidence other than the market share data offered by US West to show its diminished market power." *AT&T Corp. v. FCC*, 263 F. 3d 729, 734 (D.C. Cir. 2001).

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seeking forbearance. Verizon's showing therefore is insufficient to meet the Commission's forbearance requirements and its Petitions must be denied.

II. VERIZON'S WIRE CENTER-SPECIFIC E911 DATA IS INHERENTLY INACCURATE AND CANNOT BE RELIED UPON TO SUPPORT ITS CLAIM THAT COMPETITION IS SUFFICIENTLY ROBUST TO JUSTIFY SECTION 251(c)(3) FORBEARANCE

As indicated above, the undersigned carriers have undertaken a comprehensive examination of the empirical data submitted by Verizon with its Reply Comments. Verizon claims that this carrier line count data, obtained from the E911 database, supports the conclusion that there is sufficient competition in each wire center within the six MSAs at issue such that continued application of Section 251(c)(3) loop and transport unbundling requirements is not necessary to ensure that Verizon's rates and terms are just and reasonable and not unreasonably discriminatory.³⁷ Our analysis reveals that the wire center data is hopelessly flawed and cannot be relied upon in any manner to show the nature or extent of competitive activity in any wire center.

In its Reply Comments and supporting declaration, Verizon claims that "E911 listings are a reliable proxy for assessing competition" that "the Commission and other regulatory agencies have relied on . . . in the past" and says assertions to the contrary are "misplaced."³⁸ Verizon points out that E911 database listings have been used to assess CLEC access lines in proceedings before several state commissions, and that no regulator has reached the conclusion that E911 listings overstate actual carrier line counts.³⁹ Verizon's expert, Dr. Taylor, dismisses Mr. Gillan's testimony in several state regulatory proceedings that E911 data necessarily inflates the level of competition.⁴⁰ Dr. Taylor's statements misleadingly imply that various states have undertaken a rigorous independent analysis and ultimately concluded that E911 database line counts provide an accurate and reliable measure of the number, location and type of competition that exists in a particular market. That is not the case. None of the several

³⁷ *Verizon Reply Comments*, at 2-5.

³⁸ *Id.*, at 60.

³⁹ *Verizon Reply Comments*, Declaration of William E. Taylor on Behalf of Verizon, ("Taylor Declaration"), at ¶ 45.

⁴⁰ *Taylor Declaration*, at ¶¶ 45-51. Mr. Gillan notes in his Supplemental Declaration, appended hereto as Attachment A, that Verizon's expert offered no competing analysis that demonstrated the E911 database was in fact accurate but "merely claimed that there could be offsetting factors to the possible causes of an E911 over-count, without offering any empirical support to prove the point." *Supplemental Declaration of Joseph Gillan*, at ¶ 2 (emphasis in original) ("*Gillan Supplemental Declaration*").

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states discussed by Mr. Gillan and Dr. Taylor engaged in a comprehensive analysis of the E911 listings. Their failure to reach the conclusion that E911 listings overstate actual carrier line counts must therefore be placed in the proper context and not be considered an endorsement of the veracity of E911 data for demonstrating the level of competition that exists in a market.⁴¹

A. The Inaccuracy and Unreliability of the E911 Database as a Source of Information on the Level and Distribution of Competitive Carrier Activity Was Shown Before The Virginia Corporation Commission

The only state that has conducted an independent analysis of E911 listing information in an effort to determine whether it is an accurate and reliable source of data on the nature and level of competition in its state is Virginia. The staff of the Virginia Corporation Commission (“VA CC”), in the context of a case brought by Verizon Virginia Inc. and Verizon South Inc. (collectively, “Verizon”) for a determination that its retail services are competitive, recently undertook a close review of the E911-based CLEC line counts submitted by Verizon in support of its request for deregulation.⁴² As explained below, the staff’s analysis showed such significant discrepancies between the line counts obtained by the staff and the data used by Verizon that the staff was unable to rely on the accuracy of Verizon’s data.⁴³ Staff’s conclusion was that “relying on Verizon’s data would likely result in overstating the CLECs’ market shares in various wire centers.”⁴⁴ In the face of this empirical evidence, Verizon was forced to backpedal and in rebuttal testimony its witness, Harold E. West III, claimed that Verizon’s E911 listings are intended merely to “provide[] useful insights into the competitive presence of facilities-based CLECs” and not as an accurate measure of competitive activity.⁴⁵ Further, Mr.

⁴¹ Further, as discussed below, even if E911 data were a reliable indicator of market share, the manner in which Verizon has chosen to present E911 data in this proceeding destroys any validity the data might otherwise have had.

⁴² *Application of Verizon Virginia Inc. and Verizon South Inc. For a Determination that Retail Services are Competitive and Deregulating and Detariffing of the Same*, Case No. PUC-2007-00008, Virginia State Corporation Commission (filed Jan. 17, 2007).

⁴³ See, e.g., *Pre-filed Testimony of Kathleen A. Cummings*, Case No. PUC-2007-00008, Virginia State Corporation Commission (filed Jun. 27, 2007) (“*Cummings Testimony*”), at 9. Ms. Cummings stated her concern “that Verizon uses the results of its market share analyses to make many ‘factual’ statements in its testimony and Exhibits” and cautioned that the VA CC “should not rely on any of those statements without evaluating the underlying accuracy of the data.” *Id.*, at 9-10.

⁴⁴ *Pre-filed Testimony of Chris Harris*, Case No. PUC-2007-00008, Virginia State Corporation Commission (filed Jun. 27, 2007) (“*Harris Testimony*”), at 2.

⁴⁵ *Rebuttal Testimony of Harold E. West III*, Case No. PUC-2007-00008, Virginia State Corporation Commission (filed Jul. 16, 2007) (“*West Rebuttal*”), at 5.

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West admitted that on the business side, discrepancies between E911 listings and actual access lines in the neighborhood of 100% “are not unexpected.”⁴⁶

1. *Virginia Corporation Commission staff concluded that residential and business E911 listings substantially overstate actual competitive line counts*

As noted above, the VA CC proceeding in which the accuracy and reliability of E911 line counts has come under careful scrutiny was initiated by Verizon in an effort to gain further deregulation of its retail services within the State of Virginia.⁴⁷ In support of its position that retail services competition within the state is widespread and robust enough to justify deregulation,⁴⁸ Verizon submitted residential and business line count estimates for the CLECs operating in Virginia. VA CC staff undertook an evaluation of Verizon’s line count data, which was derived from the E911 database, in an effort to determine whether Verizon’s representations regarding CLEC market shares and, by definition, the state of competition in Virginia, were accurate. As recognized by staff expert Dr. Johnson, staff’s evaluation of the E911 data is of critical importance because “[e]mpirical market share data provides a valuable indication of the actual extent and intensity of competition, and it would be far preferable to consider that data . . . than to rely exclusively on a purely subjective or qualitative analysis. The mere existence of alternative providers is not sufficient to determine whether a market is competitive.”⁴⁹ And, as indicated by staff witness Cummings, “the importance of E911 database results takes on added weight since Verizon uses it for estimates of lines associated with facilities-based CLECs.”⁵⁰

Staff found significant discrepancies between Verizon’s CLEC line counts derived from the E911 database and the analogous line counts provided to the VA CC by the CLECs. The genesis of the problem is that the E911 database was never intended for this

⁴⁶ *Id.*, at 7.

⁴⁷ See n. 44, *supra*. Staff witness Cummings notes in her pre-filed testimony that while the differences between overall CLEC line counts estimated by Verizon and those based on reports submitted to the VA CC by CLECs had arisen in previous proceedings, “[n]either the Staff nor Verizon (or any other party) has explained or explored those differences in those proceedings.” *Cummings Testimony*, at 2.

⁴⁸ *Direct Testimony of Harold E. West III*, Case No. PUC-2007-00008, Virginia State Corporation Commission (filed Jan. 17, 2007) (“*West Testimony*”), at 91.

⁴⁹ *Pre-filed Testimony of Ben Johnson, PhD*, Case No. PUC-2007-00008, Virginia State Corporation Commission (filed Jun. 27, 2007) (“*Johnson Testimony*”), at 53.

⁵⁰ *Cummings Testimony*, at 12.

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purpose,⁵¹ so it does not track the exact number of phone lines going to each customer location. Instead, it ties phone numbers to physical addresses.⁵² Thus, the E911 database cannot simply be polled to obtain line counts. Verizon used various assumptions and estimating techniques to derive CLEC line counts from the phone numbers contained in the E911 database, but those assumptions and techniques did not cure the problem. Instead, they inflated CLEC line counts, creating “evidence” of far greater competitive penetration than actually exists. As summarized by Dr. Johnson:

Not only is there an inherent problem with attempting to estimate the number of lines from data that is limited to phone numbers and street addresses, but Verizon did not use a very accurate method for assigning the E911 data to individual neighborhoods or wire centers.⁵³

While, as Dr. Johnson points out, the resulting inaccuracies “var[ied] in magnitude from CLEC to CLEC,”⁵⁴ *in all cases* Verizon’s calculations significantly inflated the number of CLEC lines in a particular wire center, thereby furthering Verizon’s quest for deregulation. Verizon’s testimony identified business line counts for five CLECs as of March 2006. Verizon claimed that XO serves 55% more business lines than reported by XO to staff.⁵⁵ Verizon claimed Cavalier provides service to approximately 27% more residential lines than reported by Cavalier to staff.⁵⁶ Verizon claimed AT&T (including TCG and SBC) serves 127% more business lines, and 32% more residential lines, than reported to the staff by AT&T.⁵⁷ According to Verizon, NTELOS serves 1,774% more business lines, and 50% more residential

⁵¹ The E911 database ties phone numbers to physical addresses so that police, fire, and medical personnel can be dispatched in emergency situations.

⁵² See *Cummings Testimony*, at 13; see also *Johnson Testimony*, at 62. This problem is compounded by the fact that most CLECs primarily serve enterprise customers, where one line deployed to a PBX can result in the assignment of many underlying telephone numbers.

⁵³ *Johnson Testimony*, at 62.

⁵⁴ *Id.*

⁵⁵ *Cummings Testimony*, at 6-8.

⁵⁶ *Id.*

⁵⁷ *Id.*

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lines than NTELOS reported to staff.⁵⁸ And Verizon declared that TelCove provides service to 17% more business lines than described by TelCove to staff.⁵⁹

Staff's findings echoed similar conclusions by Cox Virginia Telecom, Inc. ("Cox") witness Gillan, who testified that nearly 65% of the E911 business lines claimed by Verizon for Cox do not exist and that nearly 90% of the lines derived by Verizon from the E911 database for MCI do not exist.⁶⁰ Mr. Gillan explained that "the E911 database systematically inflates business line counts by counting as a distinct line each 'phone number' from which a potential E911 call can be placed" and that Verizon "exploits this flaw" by comparing its retail "line-count to a measure of CLEC phone numbers."⁶¹ Importantly, "[t]his mismatch causes Verizon's relative line share to appear smaller than it actually is because it improperly combines two different ways to measure activity."⁶² Not surprisingly, when staff compared Verizon's retail line counts with Verizon's E911 listings, Verizon's own E911 business listings were found to be 127.5% higher than its retail business lines and its residential listings were found to be 13% higher than its retail residential lines.⁶³ The same data presented above as a percentage of E911 listings that do not correspond to actual switched access lines can also be expressed as a percentage increase in claimed competition caused by Verizon's reliance on E911 database information. As Mr. Gillan notes, "[w]hen viewed in this way, the relevant percentages would range from a "low" of 67% (Verizon), to a high of 900% (MCI). Said differently, the E911 database can be expected to inflate measures of access lines by between 67% to 900% -- hardly a reliable measure of competition."⁶⁴

Confronted with the unambiguous deficiencies in the E911 line count information in Virginia, Verizon witness West tried to mitigate the harm done to Verizon's case by stating that "what's really important is not whether the estimate quoted is 200 lines or 100 lines, what's important is the presence of the lines, what's important is the positive indication of competitive presence."⁶⁵ Mr. West effectively admitted that the E911 database would routinely be expected

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Pre-Filed Direct Testimony of Joseph Gillan - Revised*, Case No. PUC-2007-00008, Virginia State Corporation Commission (filed Jun. 1, 2007) ("*Gillan Testimony*"), at 19.

⁶¹ *Id.* (emphasis omitted).

⁶² *Id.*, at 19-20 (emphasis omitted).

⁶³ *Cummings Testimony*, at 14.

⁶⁴ *Gillan Supplemental Declaration*, at ¶ 10.

⁶⁵ *Transcript of Hearing – Volume I*, Case No. PUC-2007-00008, Virginia State Corporation Commission (Jul. 23, 2007), at 340.

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to inflate the number of competitors' business lines by 100% or more, and that it does not reliably measure competition at the wire center level:

Accordingly, at the state level, ratios of business E-911 listings to access lines in the 2:1 neighborhood are not unexpected.⁶⁶

* * *

Additionally, these same [intervening] parties question the reliability of E-911 data presented at the wire center level, despite the fact that Verizon did not use wire center level E-911 data in support of its competitive analysis. Instead, Verizon presented the E-911 data at the statewide level, and in the alternative, at an MSA/non-MSA level, *avoiding the complications of allocating data to wire centers.*⁶⁷

* * *

Verizon did not present a wire center level allocation in its Application, in part because, as noted in OAG 158, "the allocations may not be reliable at the wire center level."⁶⁸

Mr. West's statements before the Virginia Commission – both written and oral – contradict Verizon's representations to this Commission in the instant forbearance proceeding. Verizon has maintained throughout this docket that the E911 line count data is probative of the level of competition in the subject MSAs. For example, in its opposition to the ACN, *et al.* Motion to Dismiss its petitions, Verizon characterized the movants as "seek[ing] to prevent the Commission from reviewing E911 data that show extensive competition throughout the MSAs for which Verizon has sought forbearance"⁶⁹ and Verizon supplemented this pleading with a

⁶⁶ *West Rebuttal*, at 5.

⁶⁷ *Id.* (emphasis supplied). As pointed out by Mr. Gillan in his *Supplemental Declaration*, although Verizon claims it did not use E911 data at the wire center level for its competitive analysis in Virginia, it presented such data in its testimony. *Gillan Supplemental Declaration*, at n. 15.

⁶⁸ *West Rebuttal*, at 13.

⁶⁹ *Verizon Opposition to Motion to Dismiss*, WC Docket No. 06-172 (filed Oct. 30, 2006), at 1.

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letter characterizing comments in support of the motion as “a thinly veiled attempt to prevent the Commission from considering relevant information showing extensive competition.”⁷⁰

The E911 line count data submitted by Verizon in this proceeding is just as inaccurate and unreliable as the E911 line count data submitted to the Virginia State Corporation Commission. The methodology used by Verizon to arrive at CLEC-specific line counts was the same in both proceedings.⁷¹ The facts regarding Verizon’s data, as they have been elicited in the Virginia docket, are therefore directly applicable here. Those facts compel the Commission to conclude that the E911 data submitted by Verizon is fatally flawed and cannot be relied upon in making its Section 251(c)(3) forbearance determination.

B. The Inaccuracy and Unreliability of E911 Line Count Information Is Also Apparent From a Review of the E911 Data Filed By Verizon With Its Reply Comments

The conclusions reached in the Virginia deregulation docket regarding the effectiveness of Verizon’s E911 carrier line counts as a means of accurately identifying the extent of competition are equally true here. Several of the CLECs for whom Verizon supplied residential and business line counts throughout the six MSAs at issue compared Verizon’s data with their internal records.⁷² As discussed by Mr. Gillan in his *Supplemental Declaration*, those

⁷⁰ *Letter from Dee May, Vice President, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission*, WC Docket No. 06-172 (filed Nov. 6, 2006), at 1. *See also Verizon Reply Comments*, at 60 (“[A]s Verizon previously has demonstrated, E911 listings are a reliable proxy for assessing competition, the Commission and other regulatory agencies have relied on such data in the past, and the commenters’ claims to the contrary are misplaced.”).

⁷¹ *See Letter from Joseph Jackson, Associate Director – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission*, WC Docket No. 06-172 (filed Jun. 13, 2007), at Attachment A; *See also Transcript of Hearing – Volume V*, Case No. PUC-2007-00008, Virginia State Corporation Commission (Jul. 27, 2007), at 57-59. As noted by Mr. Gillan in his *Supplemental Declaration*, although Verizon provided a “low” and a “high” range in its Commission filing, while the data it filed in Virginia did not include the allocation that produced Verizon’s “high” scenario, the threshold question is whether the distribution of competitive activity asserted in Verizon’s “low” scenario is accurate even before Verizon performed the allocation that created its “high” scenario. *Gillan Supplemental Declaration*, at n. 5.

⁷² Of course, it is critical to understand as a threshold matter that any empirical data – including E911 database-derived carrier line counts – that does not differentiate between competition by carriers providing service exclusively via their own facilities (including their own local loops) and carriers providing service over facilities leased from Verizon, is of dubious value to the Commission’s forbearance analysis. As discussed in Sections I.A and I.B, *supra*, the Commission has repeatedly held that a sufficient level of

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CLECs found “not only that Verizon’s use of the E911 listing data overstates competition *generally*, it also distorts the geographic distribution of competition by causing it to appear *broader* than it actually is.”⁷³

Cavalier Communications, the largest non-cable based provider of residential services identified by Verizon in its Reply Comments and accompanying exhibits, determined the number of residential and business switched access lines it served as of December 2006 in the Philadelphia and Virginia Beach MSAs.⁷⁴ Cavalier found that Verizon significantly overstated the overall number of switched access lines actually served by Cavalier by 44% in the residential market and 95% in the business market.⁷⁵ In addition, as shown in Exhibit JPG-2 to the *Gillan Supplemental Declaration*, the number of “phantom wire centers,” *i.e.*, wire centers where Verizon claims a carrier is competing, but in which the carrier’s records show no such activity, ranges between 37% (Cavalier) and 59% (One Communications) of the total number of wire centers.⁷⁶ Moreover, there is a differential of 75% between the number of wire centers in which Verizon claims One Communications is competing in the New York MSA and the number of wire centers in which the carrier’s records show it has lines – Verizon claims One Communications is competing in 191 wire centers within the New York MSA while One Communications’ records show it is competing in only 47 of those wire centers.⁷⁷ In sum, this analysis confirms the conclusions reached by the staff in the VA CC proceeding – as well as Verizon’s own admission in that case⁷⁸ – that its E911 line counts by wire center are unreliable as a measure of local competition.

competition by carriers that connect with customers over their own last-mile facilities must be present in each product and geographic market to justify a Section 251(c)(3) forbearance determination. Verizon’s E911 carrier line counts do not differentiate lines provided by carriers exclusively over their own facilities from lines provided by carriers utilizing Verizon’s local network facilities. Thus, Verizon’s E911 line count data is of little use to the Commission’s analysis.

⁷³ *Gillan Supplemental Declaration*, at ¶ 14 (emphasis in original).

⁷⁴ Cavalier provides service in the Philadelphia MSA and the Virginia Beach MSA. Verizon’s Exhibit 3.B lists business line counts for Cavalier in nearly two dozen wire centers in the Boston MSA even though Cavalier does not provide service in that MSA. *See id.*, at ¶ 17.

⁷⁵ *Id.*, at ¶ 15.

⁷⁶ *Id.*, at ¶ 16, citing Exhibit JPG-2.

⁷⁷ *See* Exhibit JPG-2.

⁷⁸ *West Rebuttal Testimony*, at 13.

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III. **VERIZON'S SPECIAL ACCESS DATA DOES NOT SUPPORT FORBEARANCE FROM SECTION 251(c)(3) LOOP AND TRANSPORT UNBUNDLING OBLIGATIONS**

A. **The Special Access Data Provided By Verizon Is Irrelevant, Erroneous, And Does Not Support The Unbundling Relief Verizon Seeks**

In its Reply Comments, Verizon contends, among other things, that its data show extensive use of special access services by competitive carriers to provide enterprise services in the six MSAs at issue.⁷⁹ Verizon claims that this special access demand and revenue data demonstrate that local competition would be preserved even if CLECs could not access Section 251(c)(3) loop and transport UNEs and could only obtain Verizon's special access services.⁸⁰ For the reasons discussed below, Verizon's data unequivocally fail to make this case. Not only is the data irrelevant, misleading, and inaccurate, but it also fails to address or rebut the overwhelming record evidence that local competition would be significantly harmed if Section 251(c)(3) loops and transport were not available.⁸¹

First, despite being compiled on a wire center basis, Verizon's special access demand and revenue data is not relevant to the Commission's Section 251(c)(3) forbearance analysis. As stated in Section I.A, *supra*, an essential requirement of the Commission's UNE forbearance analysis, as set forth in the *Omaha Forbearance Order*, is that facilities-based carriers be ready and willing to serve 75% or more of the customer locations served by a wire center in a geographic market in which forbearance is granted.⁸² Verizon has offered no evidence whatsoever that facilities-based providers cover at least 75% of the customer locations in any wire center. In the *Omaha Forbearance Order*, the Commission considered the type of special access demand and revenue data that Verizon has submitted only in the context of a market in which it already had found that facilities-based competitors had the necessary facilities coverage and considerable market share.

Second, Verizon's claim that major CLECs are using special access much more extensively than Section 251(c)(3) UNEs, and therefore would not be affected by Section

⁷⁹ *Verizon Reply Comments*, at 5, 56-61.

⁸⁰ *Verizon Lew/Wimsatt/Garzillo Reply Declaration*, at Exhibits 5-7, & 10 (the detailed data provided in these Exhibits is marked "Highly Confidential Information - Subject to the Second Protective Order in WC Docket No. 06-172" ("Highly Confidential")).

⁸¹ *See, e.g., Reply to Comments of ACN Communications Services, et al.*, WC Docket No. 06-172 (filed Apr. 18, 2007) ("*ACN et al. Reply to Comments*"), at 10-14.

⁸² *Omaha Forbearance Order*, at ¶ 69; *see also* Section I.A, *supra*.

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251(c)(3) forbearance, is misleading at best.⁸³ Contrary to Verizon's contention, the vast majority of CLECs in the six MSAs at issue rely far more on Verizon's loop and transport UNEs than special access circuits. Verizon's special access demand data is unreliable and misleading for the following reasons:

- * Verizon only counts DS1 and DS3 UNE demand and ignores copper loop UNEs (which Verizon classifies as DS0 loops in Exhibit 4).⁸⁴ CLECs use unbundled copper loops extensively to provision innovative, reliable and cost-effective DSL and/or other high-bandwidth services, including video services.⁸⁵ Although an ILEC provisions the electronics to offer DS1 and DS3 services over its network, CLECs are increasingly using copper loop UNEs and their own electronics to offer high speed services at fiber-like speeds of 5-30 mbps.⁸⁶ Correcting Verizon's data to incorporate CLEC demand for DS0 or copper loop UNEs and comparing demand on a per circuit rather than a voice-grade equivalent ("VGE") basis reveals that CLECs purchase far more UNEs than special access circuits.⁸⁷
- * Verizon does not distinguish between special access used to provision competitive local exchange services and special access used solely to provision interexchange or mobile telephony services. Under 47 C.F.R. § 51.309(b), carriers are not permitted to obtain UNEs to provide solely interexchange or mobile services.

⁸³ *Verizon Reply Comments*, at 61; *Lew/Wimsatt/Garzillo Reply Declaration*, at Exhibit 10 (Highly Confidential).

⁸⁴ *Lew/Wimsatt/Garzillo Reply Declaration*, at Exhibit 4 (Highly Confidential).

⁸⁵ *See, e.g., Letter from Andrew D. Lipman, Bingham McCutchen, to Marlene H. Dortch, Secretary, Federal Communications Commission*, WC Docket No. 06-172, at 3 (filed Jul. 10, 2007); *Petition of XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications and Eschelon Telecom, Inc. for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops*, RM-11358 (filed Jan. 18, 2007), at 13-14.

⁸⁶ *Id.* Verizon does not currently offer special access or other alternatives to copper loop UNEs. *Id.*

⁸⁷ See Attachment B. Verizon's Exhibit 10 comparison is also inaccurate because the special access demand data appears to include demand for all types of DS1 and DS3 special access facilities, whereas the UNE demand data does not include UNEs used to provision EELs, transport, entrance facilities, and Verizon's Wholesale Advantage Service that Verizon identified in its Exhibit 4. *See, e.g., Lew/Wimsatt/Garzillo Reply Declaration*, at Exhibit 4. When the demand for these UNE circuits is included in the total demand, the comparison is more revealing and shows that CLEC demand for special access circuits is smaller when compared to their extensive demand for UNE circuits. *See* Attachment B.

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Including wholesale facilities used to provide these services in its UNE demand data therefore tips the scales heavily in favor of special access.

- * Verizon does not identify special access circuits that CLECs are forced to use because the Commission has prohibited them from accessing UNEs. In the *Triennial Review Order*⁸⁸ and the *Triennial Review Remand Order*,⁸⁹ the Commission found that CLECs are not impaired in accessing entrance facilities, dark fiber, very high-bandwidth facilities and, in select wire centers, DS1 and DS3 loops and transport facilities. CLECs thus have no alternative to utilizing Verizon's special access circuits in these circumstances, except in the very limited instances where alternative competitive services are available.
- * Verizon uses a misleading comparison based on VGE capacity rather than number of circuits or customers served. Verizon counts each DS1 and DS3 circuit as having a demand of 24 and 672 VGEs, respectively. This approach is unreliable because:
 - It assumes that all DS1 and DS3 circuits are being used for voice services, but in reality these circuits are often used for data and may not be providing the assumed equivalent number of voice circuits.
 - It assumes that all DS1 and DS3 facilities operate at 100% "fill," which is contrary to industry practice, especially for loop facilities.
 - CLECs order circuits, not VGEs; CLEC ordering, provisioning, and equipment costs are affected by the number of circuits ordered more than by their capacity.
 - As noted above, copper loop UNEs, which Verizon classifies as DS0 loops in its Exhibit 4, are not used solely to provision DS0 voice-grade

⁸⁸ *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

⁸⁹ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*"), affirmed *Covad Communications v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).